

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL REVISION APPLICATION No. 533 of 2007****For Approval and Signature:****HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**

=====

1 Whether Reporters of Local Papers may be allowed
to see the judgment ? No.

2 To be referred to the Reporter or not ? No.

3 Whether their Lordships wish to see the fair copy
of the judgment ? No.

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ? No.

5 Whether it is to be circulated to the civil
judge ? No.

=====

MAHESH @ DAMOR PRAHLADMAL SINDHI & 3 - Applicant(s)**Versus****STATE OF GUJARAT - Respondent(s)**

=====

Appearance :

MR BHARGAV N BHATT for Applicant(s) : 1 - 4.

PUBLIC PROSECUTOR for Respondent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA**Date : 17/09/2007****ORAL JUDGMENT**

1. Rule. Ms. Meeta Panchal, learned A.P.P.
waives service of notice of Rule on behalf of
respondent - State.

2. In the facts and circumstances of the
case, this application is taken up for final

hearing today.

3. The petitioners have filed present Revision Application u/s 397 read with Section 401 of the Code of Criminal Procedure, 1973 and challenged the order dated 29-8-2007 passed by the learned Addl. Sessions Judge, Bhavnagar below Exh. 90 in Sessions Case No.222 of 2005.

4. The petitioners were prosecuted for the offences punishable u/ss 302, 120B and 34 of the I.P. Code and u/s 135 of the Bombay Police Act. On the basis of complaint filed by one Jitesh Chetanbhai against the petitioners offence was registered as I - CR No. 414 of 2005 by Bhavnagar 'A' Division Police Station for incident alleged to have occurred on 26-7-2005 at about 6-00 p.m. at chowk of Rasala Camp, wherein one Kailash Chetandas sustained injuries and died on account of such injuries.

5. Petitioner No. 1 Mahesh @ Damo also filed a complaint on 27-07-2005 against Kailash Chetandas, Chandu Ghanshyamdas, Achhu Khimalmal and one unknown person for the

incident occurred at about 6-00 p.m. on the road near Gurudwara at Rasala Camp for the offence punishable u/s 324, 504, 506(2) and 114 of the I.P. Code and it was registered as I - CR No.416 of 2005 by Bhavnagar 'A' Division Police station. In both the cases, investigation was carried out by Investigating Officer Shri Rameshchandra Shankerlal Vasava the then P.I., Bhavnagar 'A' Division Police Station.

6. In the offence registered against the petitioners panchanama of scene of offence was drawn and said panchanama of scene of offence was treated as panchanama of scene of offence in the complaint filed by petitioner No.1.

7. On completion of investigation in the offence registered as I-CR No.414 of 2005 against the petitioners, charge sheet was laid for the offence punishable u/ss 302, 120-B and 34 of the I.P. Code and u/s 135 of the Bombay Police Act. As the offence was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Bhavnagar and it was registered as Sessions Case No. 222 of

2005. In the offence registered as I-CR No.416 of 2005, on completion of investigation charge sheet was laid before the learned J.M.F.C., Bhavnagar and it was registered as Criminal Case No. 8334 of 2005. Learned J.M.F.C., Bhavnagar by his order dated 28-2-2006 treated the case as cross case of Sessions Case No. 322 of 2005 and committed the case for trial to the Sessions Court and it was registered as Sessions Case No. 33 of 2006.

8. The learned trial Judge framed charge at Exh.11 against the petitioners accused who pleaded not guilty to the charge and claimed to be tried. Therefore, the prosecution adduced evidence to prove the charge. On completion of recording of evidence, further statement of petitioners - accused were recorded u/s 313 of the Code of Criminal Procedure. After hearing arguments of the learned advocates the matter was kept for delivery of judgment. Thereafter the learned trial Judge proceeded to conduct trial of Sessions Case No. 33 of 2006. The evidence of Investigating Officer P.W. 6 Rameshchandra Shankerlal Vasava came to be recorded at

Exh. 22. After recording of evidence of P.W. 6, petitioners filed application Exh.19 in Sessions Case No. 222 of 2005 u/s 311 of the Code of Criminal Procedure to recall Investigating Officer Rameshchandra Exh.83 who was examined as P.W. 22 in Sessions Case No. 222 of 2005, inter-alia contending that the witness in his deposition recorded at Exh. 22 in Sessions Case No. 33 of 2006 has deposed that "It is true that he recovered knife, knife-Jamaiya and razor from the place". This fact remained to be asked to the witness and it is necessary for merits of the case to recall the witness.

9. Learned A.P.P. made an endorsement on the application that lacuna cannot be filled up. Thereby objected to recall the witness. After hearing the learned counsel for the parties, the learned trial Judge rejected the application. Therefore present revision application has been filed.

10. I have heard learned advocate Mr. Bhargav Bhatt for the petitioners and learned A.P.P. Ms. Meeta Panchal for the respondent - State at length and in great detail.

11. Learned advocate Mr. Bhatt for the petitioners submitted that recalling of witness is essential for just decision of the case and if witness is recalled it is not likely to prejudice the prosecution; on the contrary it would bring true facts before the Court. He also submitted that in view of settled proposition that evidence in one case cannot be read in another case, fact of recovery of weapon is required to be brought on record in the present case. Therefore, learned trial Judge committed error in passing the impugned order. He also submitted that learned trial Judge ought to have exercised power to recall witness as evidence was essential for just decision of the case; but learned trial Judge did not exercise the power and remained as a silent spectator, and therefore, the impugned order is illegal and erroneous and requires to be quashed and set aside. He also relied upon number of decisions.

12. Learned A.P.P. Ms. Panchal vehemently opposed and submitted that the application moved before the trial court does not

indicate that prejudice is likely to be caused to the accused if the witness is not recalled, and therefore, it is an afterthought to fill up lacuna. She also submitted that oral submissions made by the learned advocate for the petitioners are contrary to the pleadings. Therefore, recalling of the witness is not permissible under Section 311 of the Code of Criminal Procedure as it would amount to reading evidence of one case as evidence in other case. Hence, revision application requires to be dismissed.

13. It appears that offence as I-CR No.414 of 2005 was registered against the petitioners on the basis of complaint filed by Jitesh Chetanbhai Chhatvani on 26-7-2005. Thereafter, petitioner No. 1 Mahesh @ Damo filed complaint on 27-7-1995 against Kailash Chetandas and others and it was registered as I-CR No.416 of 2005. Investigation in both the cases was carried out by P.I. Rameshchandra Shankerlal Vasava. It appears that panchanama of scene of offence was drawn in I-CR No.414 of 2005. The panchanama was produced as documentary evidence in Sessions Case No.222 of 2005 and the same panchanama was

produced in Sessions Case No.33 of 2006 as panchanama of scene of offence. On completion of trial of Sessions Case No.222 of 2005, learned trial Judge started recording evidence in Sessions Case No. 33 of 2006 and the Investigating Officer was examined as P.W. 6 in the case. It also appears from copy of deposition of said witness annexed at Annexure-F at page 21 of the compilation that during the course of cross-examination, witness admitted that knife, knife like "Jamaiya" and razor ("Astra") were recovered from the place. As observed earlier, only one panchanama of scene of offence was drawn and it was treated as panchanama of scene of offence in the other offence. According to the petitioners when Investigating Officer deposed about recovery of weapons in one case the witness is required to be cross-examined with regard to such recovery of weapons in the other case. There is no dispute about legal proposition that evidence in one criminal case cannot be treated as evidence in cross-case. Both the cases are required to be decided on the basis of evidence adduced in each case. A witness cannot be cross-examined with regard to facts deposed in cross-examination

in other case. The witness has admitted having recovered weapons during cross-examination in other case which is according to the petitioners is cross case. If the witness is recalled, it would amount to filling up lacuna. It would also amount to reading of evidence of one case in other case which is not permissible in law. The petitioners have in their application only alleged that the question sought to be asked is for the merits of the case. If the witness is recalled it would cause prejudice to the prosecution case. It is required to be recorded that the witness has deposed about recovery of weapons in the cross-examination. If the witness is recalled for further examination it would wipe out his evidence in other case and it would result into miscarriage of justice. It is true that learned trial Judge while passing the impugned order observed that Sessions Case No. 33 of 2006 is not purely a cross case. But without entering into that controversy at this stage, in my view, it is not necessary to recall the witness for just decision of the case as it would amount to filling up lacuna. Therefore, the learned trial Judge was

justified in passing the impugned order.

14. Learned advocates for the parties, relied upon decision of **Mitthulal and Anr. Vs. the State of Madhya Pradesh**, reported in **AIR 1975 SC 149**, wherein the Hon'ble Supreme Court observed that, **each case must be decided on the evidence recorded in it and evidence recorded in another case though it may be a cross-case cannot be taken into account in arriving at the decision.**" According to learned advocate Mr. Bhatt, in view of this proposition, the witness is required to be recalled so that he can be cross-examined with regard to the fact of recovery of weapons and unless that fact is brought on record of the case defence would not be in a position to bring that evidence in this case. In my view, this submission of the learned advocate for the petitioners cannot be accepted. It is settled proposition that what cannot be done directly cannot be permitted to be done indirectly. If the witness is recalled it would amount to reading of evidence in one case as evidence in another case. Therefore, the learned trial Judge was justified in passing the impugned order.

15. Mr. Bhatt also relied upon decision of **Mohanlal Shamji Soni Vs. Union of India and Anr.**, reported in **AIR 1991 SC 1346** with regard to power of the Court to summon any person as a witness or to recall and/or to re-examine him u/s 540 of the Code of Criminal Procedure, 1898. There is no dispute about the proposition laid down by the Hon'ble Supreme Court in the said decision. Even there is no dispute amongst the parties about the proposition laid down in the decision. In the present case, the petitioners have failed to indicate that recalling of witness is essential for just decision of the case, and therefore, this decision is not helpful to the petitioners.

16. Learned advocate Mr. Bhatt also relied upon decision of **Rajendra Prasad Vs. Narcotic Cell through its Officer-in-Charge, Delhi**, reported in, **AIR 1999 SC 2292**, with regard to recalling of the witness. In the said decision the Hon'ble Supreme Court observed that, no party in a trial can be foreclosed from correcting errors. The Hon'ble Court further observed in the said decision that,

"If proper evidence was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

In my view, there is nothing to indicate that proper evidence was not adduced or relevant material was not brought on record due to inadvertence. The witness is sought to be recalled only for the purpose of cross-examination on the ground of deposition in other proceedings. Therefore, this decision is not applicable in the facts of this case. Learned advocate Mr. Bhatt also relied upon decision of **Zahira Habibulla H. Sheikh and Anr. Vs. State of Gujarat and Ors.**, reported in **Air 2004 SC 311**, more particularly observations made in para 38 of the decision. In my view, this decision is also not applicable to the facts of the present case.

17. As regards submission of learned advocate Mr. Bhatt that the learned trial Judge did not take active part in the proceeding and remained mere a spectator, it appears from the

reasons assigned in the impugned order that learned trial Judge after considering the facts of the case, passed the impugned order. Power of Court u/s 311 of the Cri. P. C. is discretionary. The first part of Section gives discretion to the Court to summon any person as a witness, recall or re-examine any person already examined. Later part of section gives mandate to the Court to examine or recall or re-examine the person if it appears to the Court that his evidence is essential for just decision of the case. The learned trial Judge after considering the facts of the case decided not to exercise discretionary powers, and therefore, it cannot be said that the learned Judge acted as mere spectator. Therefore, this submission cannot be accepted.

18. Learned advocate Mr. Bhatt lastly relied upon decision of **Surendran V. State and Others**, reported in **1994 Criminal Law Journal, 464**. In the said decision Kerala High Court while dealing with Sections 145, 146 and 155 (3) of the Evidence Act and Section 162 of the Cr. P. C. held that, " **the witness may be cross-examined as to previous**

statements made by him in writing or reduced to writing and the only restriction provided is that the previous statement must be relevant to the matters in question." In the present case, the witness sought to be recalled for cross-examination is with regard to admission made during cross-examination in other proceedings. It is not permissible under the law as it would amount to bringing evidence adduced in one case as evidence in other case. Therefore, this decision cannot be made applicable in the facts of the present case.

19. In view of above, the learned trial Judge did not commit any jurisdictional error in passing the impugned order. The petitioners have failed to point out that impugned order is erroneous, illegal or perverse. Therefore, the present revision application is required to be dismissed.

20. In view of above, this revision application fails and is dismissed. Rule stands discharged.

Sd/-

(Bankim N. Mehta, J.)

/JVSatwara/